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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

JAROSLAV HOLUBAR,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 90-36

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Jaroslav Holubar's appeal of the Department of Ecology's denial of an application to appropriate surface water from a tributary of the Little Klickitat River in Klickitat County came before the Pollution Control Hearings Board on October 17, 1990, in Yakima, Washington. Member Annette S. McGee presided, with Judith A. Bendor, Chair of the Board, being present. Member Harold S. Zimmerman reviewed the record.

Jaroslav Holubar represented himself. P. Thomas McDonald, Assistant Attorney General, represented the Department of Ecology. The proceedings were reported by Susan E. Haney, Court Reporter.

Witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following:

FINDINGS OF FACT

I

The Little Klickitat River rises in the Simcoe Mountains and

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1 flows southwesterly for about 33 miles before joining the Klickitat
2 River. (Wayne Byers v. DOE, PCHB 89-168.)

3 The River is joined along this route by a number of tributaries,
4 including Canyon Creek and Bowman Creek, which join together and flow
5 into the Little Klickitat. This is the area of the water right
6 application.

7 II

8 Jaroslav Holubar is the owner of 22 acres of land in the Little
9 Klickitat Drainage Basin area within the SE 1/4 of the SW 1/4, Section
10 10, Township 4N, Range 14E, W.M. in Klickitat County. Highway 142
11 cuts across the property, and the confluence of Canyon Creek and
12 Bowman Creek join the Little Klickitat on the East side.

13 Mr. Holubar acquired the property in 1981, with a strong desire
14 to own land and plant a fruit orchard.

15 Mr. Holubar planted apple trees on 2 1/2 acres of his property.
16 He hand-dug a well to obtain water. However, he found that the well
17 dried up in the dry seasons. Therefore, he proposed to use a dripping
18 irrigation method using water from the confluence of Canyon and Bowman
19 Creeks. Drip irrigation directly places water from an emitter to each
20 tree, thus conserving water. He did not know that extracting surface
21 water from a stream needed a permit.

22 III

23 When Mr. Holubar was told of the permit requirement for
24
25
26

1 appropriating public water, he applied for one with DOE on January 19,
2 1989, (Application No. S4-29909). This was to appropriate the waters
3 of Canyon Creek at the rate of 0.007 cubic feet per second during the
4 irrigation season, for the purposes of irrigating fruit trees on 5
5 acres of his land. The irrigation season is normally from April 1 to
6 October 1 in this area.

7 IV

8 Mr. Holubar's permit was placed in a "hold" status position until
9 July 1, 1989, due to a Washington State moratorium, pending the
10 completion of a legislative review of the State's water resource
11 allocation laws and programs. (Second Substitute Senate Bill 6724
12 which was passed by the 1988 Legislature.)

13 V

14 Three adjudications have been completed in response to problems
15 created by chronic water shortages in the little Klickitat Drainage.
16 They are Blockhouse Creek, Mill Creek and the remainder of the Little
17 Klickitat River. The final decrees of a general adjudication of these
18 waters was entered. (Klickitat Co. Cause Nos. 10076, 10077 and 12978).

19 These adjudications confirmed surface water withdrawal rights for
20 withdrawals of 60.874 cfs within the drainage. In addition, minimum
21 flows were decreed to supply rights for non-diversionary stock
22 watering.

23 The adjudications appropriated more water than there is in the
24 basin. Therefore, in drought years, there is a concern, that there
25

1 may not be enough water available to satisfy the total rights
2 confirmed in the basin, especially if everyone uses their full
3 appropriations.

4 In the dry months, very little water is presently left in the
5 stream, and median flows near the mouth of the Little Klickitat range
6 between 24 and 33 cfs between July 1 and October 1.

7 Following the adjudication decree, there have been 35
8 applications pending. Nearly all have been denied on the basis of
9 potential affect on the established water rights and stream habitat.
10 Mr. Holubar's was one of the most recently filed.

11 VI

12 Initiative Measure No. 25, approved by the voters on November 8,
13 1960, now codified as RCW 75.20.110, designates all streams and river
14 tributaries to the Columbia River downstream from McNary Dam as an
15 anadromous fish sanctuary. The sanctuary is established to preserve
16 and develop fish and game fish resources within these streams and to
17 protect their habitat from encroachment.

18 The Little Klickitat River basin, including Canyon and Bowman
19 Creeks, is within this designated area.

20 VII

21 Depressed summer flows are presently exerting negative impacts on
22 fish population, through decreased habitat, increased predation,
23 increased temperatures and reduced oxygen.

VIII

Protection of fish habitat throughout the year requires that an instream flow be retained for the migration of fish from the ocean to freshwater streams at different times of the year.

IX

Both the Department of Wildlife and Department of Fisheries have sent the Department of Ecology letters recommending that no additional withdrawals be approved and that Application #S4-29909 be denied.

X

The Northwest Power Council has in the past and is presently exerting efforts to enhance salmon and steelhead production in the Little Klickitat Drainage.

XI

On January 31, 1990, the DOE issued its decision denying the Holubar application. On February 21, 1990, the Board received the Holubar appeal and assigned it docket number PCHB 90-36.

XII

Mr. Holubar's request for water appropriation is small. There is no estimate as to what impact his use alone would have on Bowman/Canyon Creek or the rest of the Little Klickitat Drainage. However, it does have some effect and, therefore, could contribute to existing adverse flow conditions, which could reduce fish

1 populations. 0.007 gpm is not significant. But the cumulative impact
2 with others is likely to be significant.

3 XIII

4 Mr. Holubar is concerned that all existing waterright holders are
5 not living within the limits of use of their established permits.

6 XIV

7 Options for obtaining water for Mr. Holubar's orchard could
8 include obtaining water from a drilled well between the layers of
9 basalt rock, either horizontally or vertically, possibly purchasing
10 another water right to change the point of withdrawal, or storage of
11 water from the high flow months.

12 XV

13 Any Conclusion of Law deemed to be a Finding of Fact is hereby
14 adopted as such. From these Findings of Fact, the Board makes these:

15 CONCLUSIONS OF LAW

16 I

17 The Board has jurisdiction over the parties and the subject
18 matter. Chapters 43.21B, 90.54 and 90.03 RCW.

19 II

20 The DOE's decision here is governed by four substantive criteria
21 of RCW 90.03.290; (1) beneficial use, (2) availability of public
22 water, 3) non-impairment of existing rights, and (4) the public
23 interest.

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III

The decision in the case concerns a "Where do you draw the line?" question. The appellant's use is small enough, that in isolation, its effects will likely not be noticed. However, the problem is many small diversions. Cumulatively, they are likely to have a substantial impact on conditions of fish habitat and/or possibly those rights already adjudicated. Under these facts, we conclude that the potential for cumulative effects prevent the criteria of RCW 90.03.290 from being met.

IV

The water code, enacted in 1917, is no longer exclusively a development code. Today it calls for a look at instream values, as well.

RCW 90.03.280 and 75.20.050 call for the DOE to notify the fish management agencies of water right applications and take into consideration their recommendations, before granting or denying a permit.

RCW 90.03.005 requires the state to "promote the use of waters in a fashion which provides for obtaining maximum benefits arising from both diversionary uses of the state's public waters and the retention of waters in sufficient quantity and quality to protect instream and natural values and rights."

V

Mr. Holubar has expressed concern that existing water right holders are not living within their limits. If true, this would be an enforcement matter for the Department, and it does not provide a reason for authorizing more withdrawals.

VI

Mr. Holubar, commendably, designed a system using a very small amount of surface water, to be used only during the dry months, so as to not waste water. A well yielding 5,000 gallons a day from ground water could be exempt under RCW 90.44.050, and could provide an adequate supply of water for a house and 1/2 acre of garden. However, the present application is for irrigating more than 1/2 acre..

VII

There is a strong public interest and law weighing in favor of protecting fish habitat, RCW 90.03.005. This is further reinforced by the statutory declaration of an anadromous fish habitat, which includes this drainage basin (RCW 75.20.110).

X

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this:

ORDER

The denial of Application No. S4-29909 is affirmed.

DONE this 17th day of December, 1990.

POLLUTION CONTROL HEARINGS BOARD

Annette S. McGee
ANNETTE S. MCGEE, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Judith A. Bendor
JUDITH A. BENDOR, Chair